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No. 84-1552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARLINE M. SODERBECK,

Petitioner,

vs.

BURNETT COUNTY, WISCONSIN, ROBERT KELLBERG, INDIVIDUALLY AND AS SHERIFF OF BURNETT COUNTY, LOWELL NELSON, EUGENE WELLMAN AND CARL BRANDENBURG, INDIVIDUALLY AND AS MEMBERS OF THE BURNETT COUNTY BOARD OF SUPERVISORS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Given the former law of Wisconsin under which the Sheriff's Office was not an office of the County government but was rather an autonomous governmental entity, can the County be held liable for the Sheriff's act of firing an employee of the Sheriff's Office in the absence of evidence that the Sheriff was in any way acting on behalf of the County?

2. Can a defendant be found to have acted with reckless indifference to the federally protected rights of others if he could not have known with any certainty that what he was doing was wrongful and subject to punishment?

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SUMMARY OF ARGUMENT

First Question. The Court of Appeals did not hold that the former provisions of the Wisconsin Constitution provided the County immunity from the acts of its officials. Rather the Court of Appeals concluded that under the Wisconsin Constitution and the evidence presented in the case, Sheriff Kellberg was not acting as an official of Burnett County when he fired Mrs. Soderbeck. The issue of whether or not the Sheriff was an official of the County

or was rather an autonomous official under Wisconsin's former system of government is an issue of state law upon which this court has repeatedly said it will defer to the judgment of the Court of Appeals. Furthermore, the answer to the issue is no longer of importance even to Wisconsin because Wisconsin's Constitution no longer provides for this system of local government.

Second Question. Consistent with the decisions of this court, the Court of Appeals held that conduct is not recklessly indifferent to the rights of others, and therefore subject to punishment by an award of punitive damages, if it is not the sort of conduct from which a jury can reasonably infer that the defendant almost certainly knew that what he was doing was wrongful and subject to punishment. A man does not act with reckless indifference to the rights of others if he engages in conduct which he could reasonably have concluded was lawful. The Court of Appeals agreed with the District Court that there was no evidence from which the jury could have inferred that Sheriff Kellberg in fact knew, or should certainly have known, that he was doing something unlawful when he fired Mrs. Soderbeck, and, therefore, properly upheld the District Court in taking the issue of punitive damages away from the jury.

ARGUMENT

I.

PETITIONER'S IMMUNITY QUESTION IS A "RED HERRING" BECAUSE THE ISSUE DECIDED BY THE COURT OF APPEALS WAS NOT A QUESTION OF FEDERAL LAW INVOLVING THE IMMUNITY DEFENSE BUT WAS RATHER A QUESTION OF STATE LAW AND SUFFICIENCY OF THE EVIDENCE AS TO WHETHER OR NOT SHERIFF KELLBERG WAS ACTING AS A POLICY-MAKING OFFICIAL OF BURNETT COUNTY AT THE TIME HE FIRED MRS. SODERBECK.

The first question presented for review by the petitioner is:

> Does a State Constitution which says that a County shall never be made responsible for the acts of the Sheriff create a total local governmental immunity against liability for violations of a citizen's basic Federal Constitutional right which occur as official policy, under color of law?

This question involves the immunity defense and is a question of federal law, but it is not the question which the Court of Appeals decided. The Court of Appeals considered the question of immunity to be a "red herring in this case" (Pet. App. A-13) because the former art. VI, §4 of the Wisconsin Constitution "[did] not purport to immunize counties from liability for their own acts" (Pet. App. A-13). The question is not whether the former provisions of the Wisconsin Constitution attempted to immunize counties from liability for the decisions of its policy-making officials but rather whether or not the Sheriff even *was* a policy-

making official of Burnett County at the time he fired Mrs. Soderbeck.

Obviously, if the Sheriff's Office was not a subdivision of the County governmental unit, but was rather an autonomous governmental entity, the policies of the Sheriff's Office were not the policies of the County. The Court of Appeals read the Wisconsin Constitution and the case law construing it and concluded that former art. VI, §4 of the Wisconsin Constitution was "powerful evidence that the Sheriff of Burnett County was not a policy-making official of the county at the time he fired Mrs. Soderbeck, but instead was an autonomous official, in much the same way as the Mayor of Chicago is not an official of Cook County" (Pet. App. A-14).

Since the Court of Appeals for the Seventh Circuit is located in Chicago, the Court used an analogy to governmental entities it certainly understands. The analogy is apt. The office of the mayor of Chicago is a division of the city government. The city of Chicago is an entirely separate governmental entity from Cook County even though the officials of the City of Chicago and the officials of Cook County are elected by the same electorate and even though the City and County officials govern the lives of the same group of people.

The Court of Appeals concluded that similarly under the former provisions of the Wisconsin Constitution, the office of the Sheriff was not a subdivision of the County government even though these two separate governmental entities governed the same electorate. The Court went on to hold that in any event, "the plaintiff made no effort to show that the sheriff is a policy-making official of the county government. The basis on which she tried to implicate the

county in the sheriff's wrongdoing was . . . the involvement of the members of the county's Law Enforcement Committee" (Pet. App. A-14).

Whether or not the Sheriff, under Wisconsin's former system of government, was a policy-making official of the County government or was an autonomous governmental entity is a question of Wisconsin law—not federal law. It required construction of the Wisconsin Constitution and Wisconsin cases.[1] Whether or not the Court of Appeals was wrong about Wisconsin law is not an appropriate question to bring to this court for review. This court has repeatedly said that its role is not to second guess the decisions of the courts of appeals on matters of state law. See, *e.g., U.S. v. S.A. Empresa De Viacao Aerea Rio Grandense,* — U.S. —, 104 S.Ct. 2755, n. 12 (1984), *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.,* 461 U.S. 190, —, 103 S.Ct. 1713, 1727 (1983).

Properly framed, the first question presented for review is:

> Given the former law of Wisconsin under which the Sheriff's Office was not an office of the County government but was rather an autonomous governmental entity, can the County be held liable for the Sheriff's act of firing an employee of the Sheriff's Office in the absence of evidence that the Sheriff was in any way acting on behalf of the County?

The Court of Appeals' answer to this question was no, the county is not liable in the absence of evidence that any

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[1] In *Bablitch & Bablitch v. Lincoln County,* 82 Wis.2d 574, 579, 263 N.W.2d 218 (1978), the Wisconsin Supreme Court held that under art. VI, §4 of the Wisconsin Constitution, "the sheriff was to be an independent elective officer."

of its officials participated in the firing. Of course, this answer is correct and is perfectly consistent with the case law of this court. This court has always recognized that the states are free to organize their local governmental entities as they see fit and has never attempted to place liability on one local governmental entity for the policies of officials who represent another local governmental entity. *Brandon v. Holt*, — U.S. —, 105 S.Ct. 873 (1985) certainly does not hold to the contrary. In *Brandon*, this court held that:

> a judgment against a public servant "in his official capacity" imposes liability on the entity that he represents. . . . 105 S.Ct. at 878.

Brandon did not hold that a governmental entity is liable for an official who does not speak for the entity but rather speaks for a separate governmental entity.

Finally, it should be noted that not only is the real question in this case a question of state law which is not appropriate for review by this court, but also that the answer no longer matters even to the State of Wisconsin because the constitutional provision at issue was repealed by the voters three years ago at the April 6, 1982, spring election. See Wis. Stat. Ann., Const., Art. 6, §4 (1984-1985 Pocket Part p. 306) and Wis. Stat. Ann. § 895.46, Comments - 1983 (1984-1985 Pocket Part p. 21).

II.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT CONDUCT IS NOT PUNISHABLE BY AN AWARD OF PUNITIVE DAMAGES ON THE GROUND OF RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS IF THE JURY CANNOT INFER FROM SUCH CONDUCT THAT THE DEFENDANT KNEW OR SHOULD CERTAINLY HAVE KNOWN THAT HE WAS DOING SOMETHING WRONGFUL AND SUBJECT TO PUNISHMENT.

The punitive damages issue raised by the petitioner does not involve Burnett County since governmental entities are immune from liability for punitive damages, *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). We will, however, offer our thoughts on the issue for the court's consideration.

The Court of Appeals held that in order to punish a defendant for reckless indifference to the rights of others, there has to be evidence from which a jury can infer "that the defendant almost certainly knew that what he was doing was wrongful and subject to punishment" (Pet. App. A-10). The Court of Appeals reasoned that the whole purpose for allowing an award of punitive damages is to punish and deter wrongful conduct and "[u]nless the defendant knew that the conduct which resulted in injury to the plaintiff was forbidden, an award of punitive damages will have no deterrent effect" (Pet. App. A-8 and A-9).

The Court of Appeals concluded that even if Sheriff Kellberg had consulted a lawyer, a lawyer might well have advised him that Mrs. Soderbeck was a confidential employee whose employment could lawfully be terminated.

The question "was an arguable point, though one the jury resolved against him" (Pet. App. A-11). The Court of Appeals agreed with the District Court that where there is no evidence that an individual in fact knew that he was doing something unlawful, the law will not punish him for conduct which reasonable lawyers could not even be expected to agree was unlawful much less "a minor rural official with no legal training" (Pet. App. A-10).[3]

Since there was no evidence from which the jury could have inferred that Sheriff Kellberg knew or should certainly have known that he was doing something wrongful when he dismissed Mrs. Soderbeck, the Court of Appeals concluded that the district court was right to take the issue of punitive damages away from the jury (Pet. App. A-11).

The decision of the Court of Appeals is not in conflict with *Smith v. Wade*, 461 U.S. 30 (1983). *Smith* does not stand for the proposition that "reckless" behavior includes that type of behavior which one does not know, and cannot be expected to know, is wrongful. *Smith* held that the plaintiff need not prove a malicious intent to injure, 103 S.Ct. at 1636 and 1640; however, a plaintiff must at a minimum prove "reckless or callous indifference to the federally protected rights of others," 103 S.Ct. at 1640. One cannot be said to have been recklessly or callously

[3]It should be noted that under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Davis v. Scherer*, — U.S. —, 104 S.Ct. 3012 (1984), government officials who are sued in their individual capacities and who raise the immunity defense cannot be held liable even for *compensatory*, much less punitive, damages if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Davis*, 104 S.Ct. at 3018. Kellberg did not raise the issue of his individual liability on appeal, so that issue was not before the Court of Appeals. Whether or not Kellberg would be liable as an individual under the principles of *Harlow* and *Davis* is, of course, a separate issue from the issue of whether or not the Sheriff's Office is liable as a governmental entity for acts done by Kellberg in his official capacity. *Brandon, supra*.

indifferent to a right which he or she could not have been expected to determine with any certainty even existed. Certainly the Court of Appeals did not err in holding that reckless behavior is that type of behavior from which one can infer that an individual "almost certainly knew that what he was doing was wrongful and subject to punishment" (Pet. App. A-10).

CONCLUSION

The decision of the Court of Appeals is not in conflict with the decisions of this court. The questions presented by the petitioner turn on issues of state law and sufficiency of the evidence and, therefore, are not appropriate questions for this court.

The petition for a writ of certiorari should be denied.

Dated: April 18th, 1985.

Respectfully submitted,

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